SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 29 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 52

S. EDWARD BLOOM,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT, STATE OF ILLINOIS.

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,

EDWARD J. HLADIS,
Chief of Civil Division,
500 Chicago Civic Center,
Chicago, Illinois 60602,
Counsel for Respondent.

RONALD BUTLER,
Assistant State's Attorney,
Of Counsel.

INDEX.

	PAGE
Opinions Below	1
Questions Presented	1, 2
Statement	2
Summary of Argument	10
Argument	
I. The Sixth Amendment to the United States Constitution Does Not Grant a Right to Trial by Jury in a Criminal Contempt Case Which Can Be Made Applicable to the Several States by Way of the Fourteenth Amendment	11
II. The Fifth and Fourteenth Amendments to the Constitution of the United States Were Not Violated by the Failure of the Trial Judge to Allow an Amicus Curiae's Report To Be Made Part of the Record, Since Defendant's Counsel Was Allowed Access to Such Report During the Cross-Examination of Witnesses Who Testified at the Trial and Made Statements to the Amicus Curiae	16
III. The Comment by the Prosecutor, in a Non-Jury Case, of the Failure of the Alleged Contemnor to Testify in His Own Behalf, Falls Within the "Harmless Constitutional Error" Doctrine of *Fahy* v. *Connecticut*, 375 U. S. 85, Which Doctrine Was Reaffirmed in *Chapman* v. *California*, 386 U. S. 18	18
Conclusion	20

CITATIONS.

Green v. *United States*, 356 U. S. 165, 187..... 12
United States v. *Barnett*, 376 U. S. 681, 692..... 12
Cheff v. *Schnackenberg*, 384 U. S. 373, 380.....12, 13, 16
Levine v. *United States*, 362 U. S. 610, 616..... 15
Fahy v. *Connecticut*, 375 U. S. 85.....18, 19
Chapman v. *California*, 386 U. S. 18, 22, 24.....18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 52

S. EDWARD BLOOM,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT, STATE OF ILLINOIS.

OPINION BELOW.

The Opinion of the Supreme Court of Illinois (R. 113-118) is Reported at 35 Ill. 2d 255, 220 N. E. 2d 475.

QUESTIONS PRESENTED.

I. Does the Sixth Amendment to the United States Constitution Grant a Right to Trial by Jury in a Criminal Contempt Case, Which Can Be Made Applicable to the Several States through the Fourteenth Amendment?

II. Were the Fifth and Fourteenth Amendments to the Constitution of the United States Violated by the Failure of the Trial Judge to Allow an Amicus Curiae's Report To Be Made Part of the Record, When Defendant's Counsel Was Allowed Access to Such Report During the Cross-Examination of Witnesses Who Testified at the Trial and Made Statements to the Amicus Curiae?

III. Does the Comment by the Prosecutor, in a Non-Jury Case, of the Failure of the Alleged Contemnor to Testify in His Own Behalf, Fall Within the "Harmless Constitutional Error" Doctrine of *Fahy* v. *Connecticut*, 375 U. S. 85, Which Doctrine Was Reaffirmed in *Chapman* v. *California*, 386 U. S. 18?

STATEMENT.

The statement of the petitioner (Petitioner's Brief pp. 7-9) fails to set forth, in a cogent or chronological manner, the fact pattern and procedure which ultimately resulted in the imposition of a twenty-four month sentence for contempt of court upon the petitioner, S. Edward Bloom. The complete facts, as evidenced by the voluminous transcript of proceedings filed in this Court, are as follows:

William A. Melody, a resident of Cook County, Illinois, died testate on the 6th day of July, 1964 (R. 3, 91). His last Will and Testament, executed on October 4, 1962, and amended by codicil on August 9, 1963, was filed in the office of the clerk of the Circuit Court of Cook County, Probate Division, on July 7, 1964 (R. 79). These documents were prepared and executed by the law firm of Lelivelt, Swidler and Juron, and filed by the executor named in the instruments, the Northern Trust Company, together with a petition requesting that the last Will and Testament of William A. Melody be admitted to probate (R. 79, 90,

91). The petition contained, among other statements, the last address of decedent, the approximate value of the estate and a list of all heirs and legatees of the decedent.

On July 17, 1964, an instrument, purported to be the last Will and Testament of William A. Melody, and dated June 21, 1964, was presented at the offices of the named executor by Pauline Owens, a practical nurse who had attended the decedent for several years prior to his death (R. 81, 83, 91). On July 20, 1964, because of the discovery of this instrument two weeks subsequent to the decedent's death, a meeting was held at the Northern Trust Company attended by officers of the bank, Mr. Swidler, and the petitioner, S. Edward Bloom (R. 91). At this meeting, the bank officers stated that it was their policy to retain the attorney who drew the Will and that if Mr. Bloom was going ahead with the filing and proof of the Will, it would be his job (R. 91). Petitioner then invited Swidler, who had represented testator during his lifetime and had prepared the instruments of October 4, 1962, and August 9, 1963, to assist him in the probating of the Will dated June 21, 1964 (R. 91). Swidler thereupon questioned petitioner as to his meeting with deceased, the circumstances surrounding his compilation of information and the contents of the Will. Petitioner informed Swidler that on June 12, 1964, he was called by Pauline Owens and that he went to the Melody apartment on that date to procure the necessary information. He also stated to Swidler that he met the decedent, carried on a conversation with him, that Mr. Melody spoke in a hoarse voice, mumbled, and that Mrs. Owens aided defendant by explaining what the deceased was trying to say. Petitioner further stated to Swidler that he prepared the Will, called for an appointment at the Melody apartment, was told to mail the document instead, and did so (R. 91, 92). Petitioner, upon request, presented a copy of the Will, which Will was signed by

witnesses and dated June 21, 1964 (R. 92). The Will dated June 21, 1964 was, on July 20, 1964, filed in the office of the Clerk of the Circuit Court, Probate Division, by the petitioner (R. 78).

On August 5, 1964, a second meeting, called at the insistence of Edward Arkema, an attorney representing certain heirs of the Melody estate, was arranged at the office of the Northern Trust Company. Those present were Mr. Kaufman and Mr. McNeil, bank officers, Mr. Arkema, Mr. Swidler and petitioner, Bloom (R. 93). Arkema inquired whether petitioner prepared or dictated the Will of June 21, 1964, how petitioner received his information, when he received the information and from whom he received it (R. 93). Petitioner stated that he prepared the Will and that he received the information from talking with Mr. Melody (R. 94). Arkema then confronted petitioner with a medical report by the physician of Mr. Melody which stated that on June 16, 1964, the decedent, in his opinion, could not communicate (R. 94). Arkema then addressed petitioner casting doubt as to the validity of the Will of June 21, 1964, and suggested that it would be best for petitioner to sign an affidavit attached to the Will that such is a true copy of the Last Will and Testament of William A. Melody. He further requested that, if petitioner were to petition for the admission of the Will to probate, a similar affidavit should be attached. Petitioner refused to do so unless he obtained written authority from the bank, whereupon the bank officials refused to issue such letter (R. 94).

On August 11, 1964, at 2:00 P.M., Judge Gumbel had set for hearing the petition of the Northern Trust Company asking the Court to admit to probate the instruments dated October 4, 1962 and August 9, 1963 (R. 93, 94). Present were Louis Swidler and Marvin Juron, in their capacity as attorneys for the executor, and Edward Arkema, attor-

ney for certain heirs of the decedent, William A. Melody. Whereupon, the petitioner, S. Edward Bloom, formally presented a petition before Judge Gumbel requesting that the instrument dated June 21, 1964, and purporting to be the Last Will and Testament of William A. Melody, be admitted to probate (R. 93, 94). The petition filed by petitioner and signed by an officer of the Northern Trust Company contained, among other matters, the following statement:

> "William A. Melody, whose place of residence at the time of his death was 2052 Lincoln Park West, Chicago, Cook County, Illinois, died July 6, 1964, leaving a Will dated June 21, 1964." (R. 3.)

At this juncture, it becomes necessary to return to those series of events surrounding the preparation of the Will which petitioner presented to the court on August 11, 1964. The circumstances with respect to the period prior to, during and immediately after the preparation of the Will dated June 21, 1964 can best be summarized as follows:

On July 8, 1964, two days after the death of William A. Melody, Pauline Owens, the practical nurse attending Mr. Melody, called at the office of attorney Bernard Koenig, who had previously represented Mrs. Owens in legal matters (R. 95). Mrs. Owens told Koenig that Mr. Melody had died on July 6, 1964; that on the date of his death a firm of lawyers had prepared a petition to probate his Will, but that this Will did not reflect the true intentions of the deceased; that she wanted another Will prepared (R. 95). Mrs. Owens also told Koenig that she had a list of the persons who were to receive bequests. Such list was written on typewriter size paper which, according to Koenig, appeared to be in Mrs. Owens' handwriting (R. 95). Koenig refused to draw up a Will but agreed to check the court file to determine if an estate had been opened (R. 95).

On July 9, 1964, Mrs. Owens and Koenig again met. Koenig told her that an estate had been opened, that a Will had been filed, and that he wanted nothing further to do with the situation. Mrs. Owens' efforts to persuade Koenig to prepare a Will for the deceased continued to no avail (R. 95).

On July 11, 1964, Mrs. Owens again called Koenig asking him to reconsider his denial to prepare a Will for William A. Melody. Koenig told her, and his testimony relates that he did so in order to discourage her from calling, to bring the sum of $1,500.00 to his office. Mrs. Owens telephoned Koenig on Sunday, July 12, 1964, stating that she had the amount he requested and would meet him at his office on Monday, July 13, 1964. Mrs. Owens appeared at Koenig's office on July 13, 1964, showed him the $1,500.00 in her purse and requested that a Will be drawn. Koenig refused and told Mrs. Owens to "get someone else." Mrs. Owens then left, without Koenig either accepting the money or drawing the spurious document which she requested (R. 96).

On July 14, 1964, Sandra Kernene, a secretary-stenographer employed on a part time basis by petitioner, S. Edward Bloom, arrived at work at approximately 12:30 P. M. As she entered petitioner's private office pursuant to his request, she observed petitioner, a client, Pauline Owens, and another secretary, Susan Cohen (R. 87). Petitioner stated that he needed Mrs. Kernene immediately; that he was going to dictate a Will (R. 87). The petitioner told her that the name of the testator was William A. Melody (R. 88). Mr. Bloom then dictated the instrument identified as Plaintiff's Exhibit 1 (R. 87). Mrs. Kernene took the dictation in shorthand; while dictating, petitioner referred to some papers or notes (R. 87). Mrs. Kernene then typed the Will, stapled it together and gave it to petitioner. After some moments, petitioner told Mrs.

Kernene that some changes were to be made, involving amounts of legacies. One change increased the bequest to Mrs. Owens from $20,000.00 to $40,000.00 (R. 89). Mrs. Kernene revised the Will and finished about 5:30 P. M. on July 14, 1964. It was read by petitioner, stapled together and handed to Mrs. Owens, who then left the office (R. 89).

Mrs. Kernene was positive that the day she typed the Will was July 14, 1964, for on that date, her husband dropped off a check for $122.00 at her office, which check she deposited in her account (R. 90). Mrs. Kernene had not been at petitioner's office since July 2, 1964; July 14, 1964, was the last date that she worked for petitioner (R. 90).

The Will typed by Sandra Kernene on the afternoon of July 14, 1964 was the same Will presented for probate by the petitioner in open court on August 11, 1964 (R. 87, 93). (See People's Exhibit 1.) Mrs. Kernene so identified the document (R. 87).

One of the signators to the document dated June 21, 1964, Velma Hoyle, testified that she and Betty Jean Tewell, the other witness, affixed their signature to the document between July 6 and July 18, 1964 at Miss Hoyle's home in Waukegan, Illinois; that it was not signed in the presence of Mr. Melody; that she affixed the date of the Will as June 21, 1964 at the direction of Alma Allen and Pauline Owens; and that the Will was left and picked up by Alma Allen after she and Betty Jean Tewell signed it (R. 37, 39). Previous to the testimony given by Velma Hoylé at the contempt hearing of defendant, both Hoyle and Tewell, on September 17, 1964, confessed to the court that they affixed their signatures to the Will after the death of William A. Melody (R. 37, 39).

Having depicted, in proper perspective, the episode of July 6-17, 1964, involving the circumstances leading to the

origination of the Will dated June 21, 1964, the events subsequent to August 11, 1964, are now recounted.

On August 18, 1964, petitioner Bloom presided over a meeting which he called at the Sherman House in Chicago, for the purpose of apprising the heirs and legatees of the Will dated June 21, 1964. At that time, petitioner urged those present to retain their own attorneys to represent them in connection with their interests under the Will. He further stated that since there might be action taken to contest the Will, they would be at liberty to retain counsel (R. 92).

On August 25, 1964, a petition was filed by Edward Walliser, an heir of the decedent, requesting the appointment of an *Amicus Curiae* to investigate fraud with respect to the estate of William A. Melody (R. 18). On the same date, the court ordered one Sam F. Fink to act as such *Amicus Curiae* with authority to investigate the circumstances of the preparation, execution, filing and presentation of the purported last Will of William A. Melody, dated June 21, 1964 (R. 36).

On September 10, 1964, a petition for a rule to show cause why Pauline Owens, Alma Allen, S. Edward Bloom, Velma Hoyle and Betty Jean Tewell should not be held in contempt of court was filed by the heirs of William A. Melody, together with the State's Attorney of Cook County (R. 18). Such petition was filed with leave of court, the court further ordered the files impounded and issued body attachments for each of the individuals named in the petition (R. 35).

On September 11, 1964, an order was entered requiring service of the rule on the above named individuals and resetting the date of the hearing on the admission to probate of the Will filed by defendant from September 23, 1964 to September 17, 1964 (R. 37).

On September 17, 1964, after hearing testimony to the effect that the witnesses to the Will of June 21, 1964, affixed their signatures to the document after July 6, 1964, and that the date shown on the Will was inserted by a witness, Velma Hoyle, at the request of Alma Allen and Pauline Owens, the court declared such Will of June 21, 1964, to be a spurious document and denied its admission to probate (R. 38).

On September 21, 1964, with all parties present before the court on the return of the Writs of Attachment previously issued and all parties released on bond, an order was entered continuing the cause to October 27, 1964, requiring at that time, all respondents to answer the charge of contempt pending before the court (R. 39).

On October 21, 1964, the State's Attorney of Cook County filed a separate petition for a rule to show cause against petitioner, S. Edward Bloom, which petition was amended on November 18, 1964, alleging the circumstances hereinbefore described, with supporting affidavits (R. 40, 44). On January 20, 1965, the motion of S. Edward Bloom to dismiss the amended petition of the State's Attorney of Cook County was denied, and a rule to show cause entered and returnable on (R. 63-64) February 1, 1965 (R. 65-64). Petitioner failed to answer the rule. A hearing commenced on February 2, 1965, and culminated on February 24, 1965, with the entry of an order adjudging the petitioner in contempt of court and sentencing him to the County Jail for a period of twenty-four months (R. 71). Defendant's request for a jury trial was denied (R. 78). The Supreme Court of Illinois affirmed, 35 Ill. 2d 255, 220 N. E. 2d 475.

SUMMARY OF ARGUMENT.

An analysis of the decisions of this Court decided on issues involving criminal contempt within the past decade clearly reflect that this Court has never insisted that an individual enjoys a federal constitutional right to a trial by jury in a criminal contempt proceeding. The requirement, in the federal courts, of a trial by jury in criminal contempt cases involving sentences of six months or more rests upon the supervisory power of this Court and not upon any constitutional ground. Since the Fourteenth Amendment empowers this Court to correct any abuse of due process of fundamental fair play in any state court proceeding, any individual adjudged in contempt of court is not without relief, and there is no need for the formulation of a new constitutional doctrine.

The Trial Court did not commit constitutional error by receiving and retaining an investigative report prepared by the *amicus curiae* prior to the institution of contempt proceedings. Petitioner was allowed access to such report on two separate occasions and also before the cross-examination of any of plaintiff's witnesses whose prior statements appeared in the report.

The "harmless constitutional error" rule has application to the prosecutor's closing remarks touching upon petitioner's failure to come forward and testify, rendering such error non-reversible, since the totality of the record indicates that the remarks did not contribute to the final adjudication, within the standard set forth in *Fahy* v. *Connecticut*, 375 U. S. 85, and *Chapman* v. *California*, 386 U. S. 18.

ARGUMENT.

I.

The Sixth Amendment to the United States Constitution Does Not Grant a Right to Trial by Jury in a Criminal Contempt Case Which Can Be Made Applicable to the Several States by Way of the Fourteenth Amendment.

The petitioner's basic contention, which provides the sole jurisdictional ground of this Court in this proceeding, is unequivocal. He proceeds on the theory that the State court's denial of a jury trial "contravened his rights under Article III, Section 2 of the Constitution of the United States and the Fifth and Sixth Amendments thereto as applied to the States by the Fourteenth Amendment" (Pet. Br. 10). Often, the statement of a theory is one thing; the demonstration and application thereof is quite another. The petitioner is experiencing this difficulty in this proceeding. After his statement of his primary contention, his argument loses its force and clarity. He engages in an involved analysis of prior decisions of this Court, which patently ignores the express language of those cases. Hence, he finds it easy and convenient to erroneously conclude "that their (*sic*) now exists on this Court a majority which on constitutional grounds alone would require a jury trial in a federal contempt matter similar to the case at bar" (Pet. Br. 13). There is no basis whatsoever for this conclusion.

It is clear from petitioner's brief that a federal *constitutional* right under the Sixth Amendment is being asserted herein—a right, which, if it does exist, accrues to every alleged contemnor in a State court proceeding by virtue of

the Fourteenth Amendment. This is his argument. That no such constitutional right exists is evident from the recent decisions of this Court.

To begin with, *Green* v. *United States,* 356 U. S. 165, held that the denial of a trial by jury in a criminal contempt case is not a constitutional infirmity. It was there said by the majority that "the principle that criminal contempts of court are not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our tradition." *Green* v. *United States,* 356 U. S. 165, 187. In *United States* v. *Barnett,* 376 U. S. 681, 692, the majority of this Court reaffirmed *Green* as follows:

> "Only six years ago we held a full review of the issue in *Green* v. *United States,* 356 U. S. 165 (1958). We held there that 'the statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in Court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.'"

In *Cheff* v. *Schnackenberg,* 384 U. S. 373, it was argued that criminal contempt proceedings were criminal actions falling within the requirements of Art. III and the Sixth Amendment to the Constitution. The petitioner therein contended that the right to a jury trial attaches in all criminal contempts and not merely in those which fall outside the category of "petty offenses." This argument was not accepted by this Court. It was noted that the sentence imposed did not exceed six months and, accordingly, this Court concluded that *Cheff* was properly convicted without a jury. Thereafter the Court continues:

> ". . . At the same time, we recognize that by limiting our opinion to those cases where a sentence not exceeding six months is imposed we leave the federal courts at sea in instances involving greater sentences. Effective administration compels us to express a view on

> that point. Therefore, *in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases,* we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof." . . . (Emphasis added.) *Cheff* v. *Schnackenberg,* 384 U. S. 373 at 380.

The petitioner, in his argument, completely ignores and avoids the basis of this Court's ruling. He prefers to assume gratuitously that the Court's determination rested upon constitutional grounds. The quoted language of the case clearly indicates that the majority decision was not bottomed upon any provision of the Federal Constitution, but solely upon its supervisory power over lower federal courts. As of this date, the majority of this Court has never adopted the view that the right to trial by jury in a criminal contempt case is constitutionally mandatory.

The foregoing summary represents the current view of this Court on the issue as to whether the Sixth Amendment guarantees the right to trial by jury to a person charged with criminal contempt. The position of the petitioner completely ignores the thrust of these recent decisions with respect to the extent of constitutional safeguards in this area. This latter observation becomes sharply significant when it is realized that these decisions denying an individual a federal constitutional right are very recent, and the legal doctrines expressed therein were promulgated at a time when constitutional questions in other areas involving personal rights and liberty have been extended far beyond the scope of prior constitutional construction. In short, the legal principles governing the trial of criminal contempt, as we know them today, are the result of a careful reappraisal and reexamination of the question by this Court within the last decade.

It is quite apparent, then, that the present contention of petitioner is not correct and must necessarily rest upon a *non sequitur*: He seeks to impose upon the State courts through the Fourteenth Amendment a constitutional requirement purportedly based upon the Sixth Amendment, which has not been imposed upon the federal courts themselves. It would indeed be anomalous for this Court to sanction a constitutional right to trial by jury in State criminal contempt proceedings while it rests such right in federal criminal contempt proceedings upon a non-constitutional and less stringent requirement.

Moreover, practical considerations in the judicial administration of justice and reason militate against any effort by the petitioner to fashion in this proceeding a retractable yardstick governing Sixth Amendment constitutional rights, which flexibility would be dependent solely upon the length of sentence in the case of criminal contempt. In the first place, a person charged with criminal contempt is entitled to know what his rights are prior to the commencement of proceedings, and should not be forced to await the final step, namely, sentence, to ascertain what rights he should have been accorded.[1]

Secondly, consider the dilemma of the trial judge prior to trial. What standard or foresight must he use, outside of pre-judgment of the cause on trial, to enable him to determine whether the contempt case before him constitutes one which would require the impanelling of a jury, or one which he may summarily hear? There seems inherent in this problem a paradox abhorrent to the Constitution

1. The petitioner may not be prosecuted for any offense arising out of the transpiration of events which is presently involved before the Court (cf: Pet. Br. note 9, p. 16) since the "commission of the offense" occurred on August 11, 1964 (R. 3), and under Illinois law, the limitation within which such prosecution might commence would be three years (Ill. Rev. Stat., 1965, ch. 38 § 3-5).

itself. If the Sixth Amendment right were to be placed on such tenuous grounds, can the safeguards of the Fourteenth Amendment assure an accused a trial free from any preconceived opinions of the trier, not only as to guilt or innocence but as to the severity of sentence as well?

Thirdly, the viewpoint that would link the necessity of a trial by jury, as a matter of constitutional right, with the severity of the punishment, which might be imposed, fails to recognize that a jury, under Illinois law, functions solely with respect to guilt or innocence and has no responsibility to recommend or impose a sentence. The relationship between these two concepts simply does not seem to be sufficiently realistic or practical to warrant the formulation of a constitutional doctrine thereon.

The underlying reason, if any, for the assertion that a person must be guaranteed the right to a jury trial where the sentence exceeds a specified limitation must presumably be the additional safeguard of requiring someone other than the one responsible for sentencing to initially determine whether an accusation of contempt is proven beyond a reasonable doubt. But what application can that rationale have in a proceeding where, as here, petitioner has never seen fit to challenge the *quantum* of evidence which resulted in the adjudication of contempt?

By way of summary, the petitioner endeavors to convince this Court to make a constitutional stride, which heretofore it has consistently refused. The respondent maintains that such doctrine need not be promulgated to satisfy basic concepts of due process. This Court possesses, by way of the Fourteenth Amendment, a constitutional power over State courts which insists upon the notion that "justice must satisfy the appearance of justice." *Levine* v. *United States*, 362 U. S. 610, 616, quoting from *Offutt* v. *U. S.*, 348 U. S. 11, 14. Any abusive exercise by a State court regarding the rights of an individual defendant may

be reached and rectified consistently with fundamental requirements of due process by this Court. In this way, the basic constitutional rights of an alleged contemnor will be protected without violation of the delicate balance which exists between the federal government and the several states. This is especially true when we are dealing with the traditionally inherent power of a court to punish for contempt, which even *Cheff*, upon which the petitioner relies so heavily, regards as *sui generis*. *Cheff* v. *Schnackenberg*, 384 U. S. 373, 380.

II.

The Fifth and Fourteenth Amendments to the Constitution of the United States Were Not Violated by the Failure of the Trial Judge to Allow an Amicus Curiae's Report To Be Made Part of the Record, Since Petitioner's Counsel Was Allowed Access to Such Report During the Cross-Examination of Witnesses Who Testified at the Trial and Made Statements to the Amicus Curiae.

Petitioner contends that the trial court committed constitutional error by investigating petitioner's conduct through the appointment of an amicus curiae, who submitted an investigative report to the judge, by having knowledge of the contents of said report prior to the institution of the proceeding, and by its refusal to make the report part of the record on appeal. The Supreme Court of Illinois, in denying the validity of petitioner's claim, stated (R. 116):

> "The record does not show, nor does the defendant indicate, how the report and its presentation to the judge worked any prejudice or harmed him in any way. The appointment of an amicus curiae to make an investigation has heretofore been recognized as proper (*People* v. *Goss*, 10 Ill. 2d 533), and the evidence, all of which was heard in open court, not only is ample to sustain the finding but is largely undisputed by defendant."

It is not uncommon, in a matter involving contempt of court, for a trial judge to be apprised, in a preliminary context, of certain facts which have occurred outside his presence which may form the basis for the filing of a petition for a rule to show cause. There may be the necessity, in such case, to appoint someone to investigate the informal charges to determine whether the complainant has brought forward a series of facts which might effectuate the issuance of a petition for a rule to show cause. By the same token, the purpose of any preliminary investigation serves the protective purpose of determining, prior to the formal institution of a petition for a rule, whether charges made can sufficiently or reasonably be substantiated. Such initial knowledge on the part of the trial judge is strategically necessary for proper use of the contempt power.

Should petitioner have decided that the amount of knowledge possessed by the trial court has reached the stage where, in his opinion, the judge could not have been considered an impartial observer, a motion for change of venue from said judge, if requested by petitioner, would have to have been granted. Petitioner filed no such motion.

Petitioner has not only failed to show how any prejudice was created by the action of the trial judge in connection with the *Amicus* report, but some doubt arises as to whether the nature of his request regarding the investigative report was not honored. The record indicates that defense counsel made the following statement regarding a request for the report:

> "Mr. Eben: If the Court please, as I indicated to your Honor, that we would move for the production today of the so-called Fink investigative report. I understand your Honor at that time that it would not be made available until some witnesses took the stand, whose statement was reflected in the report. Of course, we have no way of knowing, not having seen the report, but I understand if there is any witness' statement in

the report some place, or reference to any witness, we would like to have that made available.

The Court: It is not a part of the record. It belongs to the Court itself, and the Court will turn it over to you, and you will be at liberty to read it as concerns any witness' testimony. The Court wants to get at the truth or falsity of this entire proceeding. So I will turn it over to you and you may use it for cross-examination. I will give you time to examine it." (R. 80, 81.)

Petitioner's statements concerning the *in camera* nature of the report (Pet. Br., p. 18), and concerning the argument that certain portions of the report were not made available to him (Pet. Br., p. 20) are not accurate reflections of what actually transpired in the trial court (R. 83, 86). The Court made no attempt to conceal the fact that an investigative report had been filed, and gave defense counsel sufficient opportunity to examine its contents. Respondent, therefore, maintains that no constitutional violation had occurred, but that the issue raised represents the product of a theory which is not, and cannot be, related to the facts of the case at bar.

III.

The Comment by the Prosecutor, in a Non-Jury Case, of the Failure of the Alleged Contemnor to Testify in His Own Behalf, Falls Within the "Farmless Constitutional Error" Doctrine of Fahy v. Connecticut, 375 U. S. 85, Which Doctrine Was Reaffirmed in Chapman v. California, 386 U. S. 18.

Petitioner claims that the closing argument of the Assistant State's Attorney, which made reference to the fact that petitioner's counsel failed to produce the petitioner (R. 112), both violates his constitutional rights and requires a reversal of the contempt adjudication. It is the position of respondent, however, that, under the circumstances present in the case at bar, such allegation falls within the "harm-

less error'' rule promulgated by this Court in *Fahy* v. *Connecticut,* 375 U. S. 85 and reaffirmed in *Chapman* v. *California,* 386 U. S. 18.

In *Chapman,* this Court stated as follows (p. 24):

> "There is little, if any, difference between our statement in *Fahy* v. *Connecticut* about 'whether there is a reasonable possibility that the evidence complained about might have contributed to the conviction'' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case.''

The Court, in refusing to adopt a rule that would allow all such errors to be automatically reversed, further stated (p. 22):

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not resulting in automatic reversal of the conviction.''

The application of this principle to the case at bar is quite pertinent when consideration is given to two specific factors: (1) the case was heard by a judge sitting without a jury, and (2) the evidence establishing the basis for the adjudication of contempt was so overwhelming that petitioner, himself, did not question the sufficiency at any time during review by the Supreme Court of Illinois. Viewed in

this light, the error of which petitioner complains is so insignificant as to be placed within the scope of the harmless constitutional error rule.

CONCLUSION.

The decisions of this Court have never required, on constitutional grounds, the granting of a trial by jury in a criminal contempt case. While the latest majority decision of this Court pronounced a non-constitutional right to trial by jury in federal criminal contempt cases, the relief requested by petitioner, a Sixth Amendment right to trial by jury as applied to the states, through the Fourteenth Amendment, is, until today, unprecedented. Respondent maintains that a continuation of existing policy of this Court in refusing to espouse a constitutional right to trial by jury in this area, making use of the Fourteenth Amendment power to correct any abuse of fair play or notions of injustice in a state criminal contempt proceeding, will inevitably result in both the protection of the rights of alleged contemnors and the inviolability of the power of a state court to effectively administer its judicial system.

For all the foregoing reasons, respondent respectfully prays that the decision of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,

EDWARD J. HLADIS,
Chief of Civil Division,
500 Chicago Civic Center,
Chicago, Illinois 60602,
Counsel for Respondent.

RONALD BUTLER,
Assistant State's Attorney,
Of Counsel.